Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RUST ENGINEERING COMPANY, INC.,
Petitioner,

v.

FRANK CAMPBELL,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When a trial court determines that front pay in lieu of reinstatement is an appropriate remedy in an action under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, is the determination of the amount of front pay to be awarded, if any, a question for the court or the jury to decide?

LIST OF PARTIES PURSUANT TO RULE 29.1

The Rust Engineering Company is a wholly-owned subsidiary of Wheelabrator Technologies of North America, Inc.; which is a wholly-owned subsidiary of Resco Holdings Inc.; which is a wholly-owned subsidiary of Wheelabrator Technologies Inc., of which 55.7% is owned by Waste Management, Inc. Non-wholly-owned subsidiaries are as follows:

	% of Ownership	State/Country Of Incorporation
RESCO HOLIDINGS INC.	100	Delaware
The Henley Group, Inc. (Common stock- 1,043,687 shares)	5	Delaware
Henley Properties Inc. (Class B Common Stock- 1,043,687 shares)	52	Delaware
Indabrator Limited	20	India
Wheelabrator Alloy Castings Limited	10	India
Wheelabrator Technologies of North America Inc.	100	Delaware
Cogenic, Inc.	20	Delaware
Rust International Corporation	100	Delaware
Pullman Swindell Mexicana S.A. de C.V.	49	Mexico
Pullman Power Products Corporation	100	Delaware
High Concrete Engineering Company	40	Japan
Pullman-Hoffman, Inc.	80	Ohio
SNC-Rust Ltd./SNC-Rust Ltee.	49	Canada
Wheelabrator Allevard, S.A.	51	France
Wheelabrator Allevard Italiana S.A.R.L.	100	Italy
Abrasivi Metallici Industriale S.p.a.	96.3	Italy

	% of Ownership	State/Country Of Incorporation
Wheelabrator Allevard Espanola S.A.R.L.	50	Spain
The Wheelabrator Corporation	100	Delaware
Sintobrator Ltd.	49	Japan
Wheelabrator Technologies (UK) Limited	100	United Kingdom
Tilghman Wheelabrator Limited	100	United Kingdom
Indabrator Limited	20	India
Wheelabrator Alloy Castings Limited	10	India
Wheelabrator Cleanfuel Corporation	100	Delaware
Wheelabrator Coal Refinery Inc.	100	Delaware
ICRC Company	50	Delaware
International Coal Refinery Company	50	Delaware
Wheelabrator Sinto do Brasil Equipamentos Industrialis Ltda.	60	Brazil
Wheelabrator Investments Inc.	100	Delaware
The Henley Group, Inc.	4.7	Delaware
Henley Properties Inc. (Class B Common Stock-980,382 shares)	48	Delaware

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No. ———

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FRANK CAMPBELL,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rust Engineering Company, Inc., the petitioner, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit that was entered in this case on March 5, 1991.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which was not recommended for full-text publication, is attached as Appendix A. The memorandum opinion of the United States Magistrate, over-

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[1] No order as such was entered in the Court of Appeals. The per curiam opinion of the Sixth Circuit is referred to herein as the order.

ruling Rust Engineering Company, Inc.'s motion for judgment notwithstanding the verdict, is attached as Appendix B.

STATEMENT OF JURISDICTIONAL GROUNDS

The order from which review is sought was entered on March 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). No rehearing was sought before the Court of Appeals and no extension of time for filing this petition was sought from this Court.

STATUTE INVOLVED

This case involves two sections of the Age Discrimination in Employment Act, (ADEA), § 7(b), 29 U.S.C. § 626(b) and § 7(c), 29 U.S.C. § 626(c).

In relevant part, § 7(b) provides:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

Section 7(c) provides in part:

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: . . .
>
> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

STATEMENT OF THE CASE

Respondent Frank Campbell, plaintiff below, brought this action under the ADEA, 29 U.S.C. §§ 629, *et seq.*, alleging that Rust Engineering Company, Inc. (Rust), his former employer, defendant below, had unlawfully discharged him on account of his age. Campbell, who was age 56 at the time of trial, had worked for Rust as a clerical employee at a salary of about $19,000.00 a year. He sought both legal and equitable relief: back pay, benefits, liquidated damages, and reinstatement or, in the alternative, front pay.

The case was tried in the United States District Court for the Eastern District of Tennessee before a magistrate and a jury. At the close of the evidence, but before the case was submitted to the jury, the magistrate concluded that it would not be appropriate to order the reinstatement of Campbell if a verdict were returned in his favor and that front pay in lieu of reinstatement was therefore an available remedy. Rust contended that the nature of the front pay remedy, and the circumstances of the case,[2] were such that the court rather than the jury should determine the amount of front pay to award, if any. The magistrate disagreed and submitted the issue to the jury, which returned a verdict for Campbell that included an award of $65,370.00 in front pay.

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[2] Rust, a construction and engineering firm, employed Campbell at Oak Ridge, Tennessee, where its work was governed by a construction contract with the United States Department of Energy (DOE). Rust's contract with DOE was due to expire on September 30, 1990, one year after this case was tried. When DOE rebid the contract, Rust submitted a bid on the work in competition with several other firms. At the time of trial, in September 1989, DOE had not acted upon the bids and it was therefore not possible to know whether Rust or one of the other competing firms would be the successful bidder. If Rust were not the successful bidder, its work at Oak Ridge would end at the expiration of its contract on September 30, 1990.

On appeal to the United States Court of Appeals for the Sixth Circuit, Rust maintained that front pay in lieu of reinstatement is an equitable remedy and that the magistrate had erred by submitting the front pay issue to the jury instead of retaining it as an issue for the court. The Sixth Circuit rejected this contention. In reliance upon *Fite v. First Tennessee Production Credit Ass'n.*, 861 F.2d 884 (6th Cir. 1988), it held that "whether the issue of front pay goes to the jury is discretionary with the trial judge" and that the trial court had not abused its discretion by submitting the issue to the jury. *Campbell v. Rust Engineering Company, Inc.*, Slip Opinion, p. 8. The jury's award of front pay was therefore affirmed.

The question thus arises: When reinstatement is found to be an inappropriate remedy in an ADEA case, is the amount of front pay to be awarded, if any, a question for the court or the jury to decide?

REASONS FOR GRANTING THE WRIT

Rust submits that its petition should be granted for two reasons.

A.

The first reason involves the conflict among the circuits on the question presented for review. Sup. Ct. R. 10.1(a) (1990). The ADEA empowers courts "to grant such legal or equitable relief as may be appropriate," including reinstatement, promotion, back pay and liquidated damages, § 7(b), 29 U.S.C. § 626(b), and provides for "a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action." § 7(c), 29 U.S.C. § 626(c). Although authorizing both legal and equitable relief, § 7(b) "does not specify which of the listed categories of relief are legal and which are equitable." *Lorillard v. Pons*, 434 U.S. 575, 583 n. 11 (1978).

All circuits now agree that § 7(b) authorizes an award of front pay—the loss of future earnings—when a trial court concludes that it is not possible or appropriate to order reinstatement, the preferred equitable remedy under the ADEA.[3] *Duke v. Uniroyal, Incorporated*, 928 F.2d 1413 (4th Cir. 1991); see also *EEOC: Policy Statement on Front Pay as a Remedy Under ADEA*, 405 BNA Fair Employment Practices Manual 3301 (1988). All circuits also agree that whether reinstatement or front pay is the appropirate remedy in a given case is a question for the trial court to decide.[4] *See, e.g., Hansard v. Pepsi-Cola Metropolitan Bottling Co. Inc.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 129 (1989).

There is however, a major conflict among the circuits with regard to the question on which review is sought—the question whether the quantification of front pay is an equitable issue for the court to decide or a legal issue

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[3] Although the ADEA was enacted in 1967, front pay does not appear to have been recognized as an available remedy under the Act until fairly recently. (The Act itself does not refer to front pay.) The Sixth Circuit, for example, did not address the question whether front pay is an available remedy under the ADEA until 1984. *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 922 (6th Cir. 1984). As late as the early 1980's there was still considerable disagreement as to whether front pay could even be awarded in the ADEA case. *See, e.g., Koyen v. Consolidated Edison Co. of New York, Inc.*, 560 F. Supp. 1161, 1167 nn.33-34 (S.D.N.Y. 1983); Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 Md. L. Rev. 298, 331-35 (1986).

[4] "[A]n order of reinstatement and an award of front pay are mutually exclusive remedies . . ." under the ADEA. *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1988). When a trial court determines that reinstatement is not possible or feasible, it also in effect is determining that front pay may be an available remedy. The Sixth Circuit has said that when reinstatement is not appropriate, "front pay is a remedy presumed appropriate unless record evidence clearly demonstrates the contrary." *Farber v. Massillon Board of Education*, 917 F.2d 1391, 1397 (6th Cir. 1990).

for the jury to decide. Three different views have emerged.

(1)

One view is represented by decisions of the First, Second, Fourth, Fifth, Eighth and Eleventh Circuits, which expressly hold that front pay is an equitable remedy and that the amount of front pay to be awarded is therefore a question for the court. *See Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1257 (2d Cir. 1987); *Duke v. Uniroyal Incorporated*, 928 F.2d 1413 (4th Cir. 1991); *DeLoach v. DelChamps, Inc.*, 897 F.2d 815, 823-24 (5th Cir. 1990);[5] *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988); and *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1563 (11th Cir. 1988).

The Seventh and Tenth Circuits appear to agree with the rationale of the decisions just cited. In its most recent decision on this issue, *Hybert v. Hearst Corp.*, 900 F.2d 1050 (7th Cir. 1990), the Seventh Circuit affirmed the district court's retention of the front pay issue after the jury had returned a verdict for the plaintiff comprised of back pay and liquidated damages.[6] The *Hybert*

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[5] Earlier the Fifth Circuit had reached the contrary conclusion. *See Hansard v. Pepsi-Cola Metropolitan Bottling Co. Inc.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 129 (1989) ("If the trial court concludes that front pay is appropriate, then the jury should determine the amount of damages").

[6] The Seventh Circuit first addressed this issue in *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1333 n.4 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988), *vacated on other grounds*, 486 U.S. 1020 (1988), *on remand*, 860 F.2d 834 (7th Cir. 1988), where it said in dictum that the amount of front pay is a jury question. Later, in an appeal from a district court decision which expressly declined to follow the *Coston* dictum, in part because the parties had stipulated for the court to decide all damage issues, *Miller v. Pabst Brewing Co.*, 670 F. Supp. 1420 (E.D. Wis. 1987), the Seventh Circuit found

decision referred to front pay as "additional equitable relief." *Id.* at 1051, 1055. The Tenth Circuit affirmed the trial court's use of a similar procedure in *Spulak v. K mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), and in *EEOC v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166, 1173 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985).

(2)

The opposite view is represented by decisions of the Third and Ninth Circuits which expressly hold that front pay is a legal remedy and that the amount of front pay to be awarded is a question for the jury. *Maxfield v. Sinclair International*, 766 F.2d 788, 796 (3rd Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); and *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988). Without discussing whether front pay is a legal or an equitable remedy, these decisions have assumed that the jury is to decide the amount of the front pay to award. *Maxfield*, 766 F.2d at 796 ("Of course the amount of damages available as front pay is a jury question"); *Cassino*, 817 F.2d at 1347 ("If the court concludes that reinstatement is not feasible, the jury then decides the amount of the front pay award").[7]

(3)

A still different view of this issue is taken by the Sixth Circuit. Alone among the circuits, it holds that whether

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it unnecessary to decide what is described as the "difficult question whether a jury trial is available with respect to an award of front pay under the ADEA." *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989).

[7] The most thorough discussions of whether front pay is a legal issue for the jury or an equitable issue for the court are found in *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1256-59 (2d Cir. 1987), and in *Duke v. Uniroyal, Incorporated*, 928 F.2d 1413 (4th Cir. 1991). See also Breaux, *Front Pay or Reinstatement Under the ADEA: Who Decides and What Does It Matter?*, 16 Empl. Rel. L. J. 115 (1990).

front pay is quantified by the court or the jury is a question that lies within the discretion of the trial judge. *Campbell v. Rust Engineering Company, Inc.*, Slip Opinion, p. 8. In so holding in the present case, the Sixth Circuit relied upon its decision in *Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884 (6th Cir. 1988).

Fite involved an appeal from a jury's award of front pay. Before the Sixth Circuit the appellant maintained that "the task of determining the amount of front pay is [an equitable issue] for the court and not the jury," *id.* at 892-93, citing in support of this contention three of the cases cited above in (1), *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249 (2d Cir. 1987), *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985) and *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982). The *Fite* court declined to follow these decisions, saying the "contention that front pay is not a question for the jury is at odds with the authority of this circuit," *id.* at 893, and affirmed the jury's front pay award.[8]

Although holding that the trial courts are to use their discretion in deciding whether the court or the jury decides the amount of front pay to be awarded, if any,

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[8] The "authority of this circuit" to which *Fite* referred was *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984), a case that did not explicitly involve the question whether the court or the jury should determine the amount of front pay. The issues in *Davis* were whether front pay is an available remedy under the ADEA and, if so, whether the trial court had abused its discretion in approving the jury's award of front pay. The court in *Davis* merely held that front pay was an available remedy, that "an award of front pay must be governed by the sound discretion of the trial court" and that the trial court's approval of the jury's front pay award was not an abuse of discretion. *Davis*, 742 F.2d at 923. Since neither party had objected at trial or on appeal to the submission of the front pay issue to the jury, the *Davis* court had no occasion to address the question whether the issue was for the court or the jury.

the Sixth Circuit has thus far not articulated any of the factors the trial courts are to consider in exercising their discretion on this issue.[9]

In summary, there is a major and wide-spread conflict among the circuits on the question presented for review. At least six of the circuits hold that determining the amount of front pay is an equitable issue for the court to decide. Two of the circuits hold that it is a legal issue for the jury to decide. And one of the circuits—the Sixth —holds that whether the court or the jury decides the issue is a matter that lies within the discretion of the trial court. Given the extent of the conflict, and the confusion and uncertainty it creates, there is a clear and present need for the Court to grant this petition and to resovle the issue.

B.

The second reason for granting the petition involves this Court's Rule 10.1(c). Whether the court or the jury decides the amount of front pay to award is a question of fundamental importance in the administration of the ADEA. *See Lorillard v. Pons*, 434 U.S. 575 (1978) (whether there is a right to jury trial is an "important issue in the administration of the ADEA." *Id.* at 577).

A large number of age discrimination cases are being filed every year and there is no reason to believe that

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[9] For this reason it is difficult to reconcile the cases in which the Sixth Circuit has affirmed the trial court's determination of front pay with those in which it has approved the trial court's submission of the issue to the jury. Compare *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988) and *Polk v. Yellow Freight System, Inc.*, 801 F.2d 190 (6th Cir. 1986), in both of which back pay issues were decided by the jury and reinstatement and front pay issues were decided by the court, with the decisions which have found that the trial court did not abuse its discretion in submitting front pay issues to the jury or in approving the amount of front pay awarded by the jury. *Campbell, supra; Fite, supra*; and *Davis, supra.*

fewer such cases will be filed in the years to come.[10] Although front pay is a remedy of relatively recent vintage under the ADEA, its use in age discrimination cases is becoming more and more common. The experience of the past ten years teaches that the question raised by this petition is certain to recur with increasing frequency.

Whether the court or the jury decides the amount of front pay should not depend upon geography. The answer to this basic question should not vary from circuit to circuit, from district to district within a circuit,[11] or

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[10] See Anderson, *Age Discrimination: A Growth Industry*, 25 Tenn. B.J. 24 (November/December 1989) ("*The Wall Street Journal* last year reported that 27,000 complaints of age discrimination were filed with state and federal agencies, more than twice the number filed in 1980. Since 1983, the Federal Equal Employment Opportunity Commission (EEOC) has collected more than $172 million from employers on behalf of individuals who claimed they were victims of age discrimination. 125 Lab. Rel. Rep. (BNA) 45 (July 20, 1987). In fiscal 1988, 1,600 benefits discrimination claims were alleged to EEOC and state agencies. 131 Lab. Rel. Rep. (BNA) 317." *Id.* at 24).

Statistics compiled by the EEOC show that during the calendar years 1985-1990 a total of 93,545 ADEA charges were filed with that agency. (See Appendix C.) The number of ADEA suits filed by the EEOC in 1989 rose by more than 26 percent. See "A Report on the Operations of the Office of the General Counsel, October 1988 through September 1989," reprinted in 2 CCH Employment Practices Guide, p. 6986, 6990 (1990). Seventy percent ($25,015,137) of the monetary benefits recovered by the EEOC in fiscal year 1989 were in suits filed under the ADEA. *Id.* at 6999-5.

[11] See *Stafford v. Electronic Data Systems Corp.*, 741 F. Supp. 664 (E.D. Mich. 1990), where the district court construed the Sixth Circuit's *Fite* decision as not laying down a "hard-and-fast rule." *Id.* at 666. *Stafford* went on to hold that since "reinstatement is within the province of the court, then its substitute—front pay—is within the province of the court as well." *Id.* In reaching this conclusion, the district court expressly adopted the reasoning of *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249 (2d Cir. 1987) (front pay is an equitable remedy for the court), which the *Fite* decision had declined to follow. So while the front pay issue goes to the jury in the Eastern District of Tennessee, at least most of the time, in the Eastern District of

depend on the uncanalized discretion of trial judges. The ADEA is a statute of nationwide application. The answer to this question should be the same everywhere.

That there is a compelling need for uniformity in the procedures governing front pay cannot be denied. *See, e.g., Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). Procedures are important, for "a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters Union*, 346 U.S. 485, 491 (1953). It is no longer reasonable to believe that the ongoing process of litigation will harmonize the conflict among and between the several circuits. Instead of bridging the differences and producing a uniform body of law, ten years of lower court decisions have created the conflict and confusion that exists today. There should be no conflict or confusion over the question whether court or the jury decides the amount of front pay. Under §§ 7(b) and (c) of the ADEA, this question is either for the jury to decide or it is not. The question needs to be settled.

Michigan it always is retained by the court. To this extent there is an intra-circuit conflict within the Sixth Circuit.

CONCLUSION

For the reasons stated above, and in *Lorillard v. Pons*, 434 U.S. 575 (1978), Rust respectfully submits that its petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5679

FRANK CAMPBELL,
Plaintiff-Appellee,
v.

RUST ENGINEERING CO., INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Tennessee

[Filed Mar. 5, 1991]

Before: GUY and BOGGS, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM: Plaintiff, Frank Campbell, brought this action pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, and Tennessee's Human Rights Act, Tenn. Code Ann. §§ 4-21-101, *et seq.* Plaintiff alleged that his former employer, Rust Engineering Company, Inc. (Rust), discharged him because of his age. Following a trial before a magistrate, the jury returned a verdict for the plaintiff and awarded damages. Defendant Rust appealed the judgment and asserts the following claims: (1) the magistrate erred when he denied defendant's motion for a judgment not-

withstanding the verdict (JNOV) with regard to both of plaintiff's claims; (2) the magistrate erred in denying defendant's motion for JNOV with regard to plaintiffs claim for liquidated damages under the ADEA; (3) the magistrate erred when he submitted the question of front pay to the jury, rather than retaining it as a question for the court; (4) the magistrate erred when he denied defendant's motion for a new trial on the basis that the award of front pay was excessive or, in the alternative, erred in not ordering a remittitur reducing this damage award; (5) the magistrate erred when he admitted into evidence a statement made by plaintiffs supervisor; and (6) the magistrate erred when he denied defendant's motion for a JNOV on plaintiff's claim under Tennessee law and also when he refused to grant defendant's motion for a new trial on this issue.

With the exception of its claim relative to the pendent state claim, we find defendant's allegation of error to be without merit and affirm. We find the jury's award for embarrassment and humiliation, pursuant to the Tennessee Human Rights Act, excessive and, accordingly, reverse and remand on this issue.

I. Facts

Rust is engaged in the engineering and construction business. Rust does contract work for the Department of Energy (DOE) at Oak Ridge, Tennessee. Although Rust has had construction and maintenance contracts for DOE since the late 1960s, Rust's contract at the time of trial, was due to expire in September of 1990. Rust submitted a bid to continue its work for the DOE along with several other firms. At the time of trial, the DOE had not awarded any contracts for the Oak Ridge facility.

In addition to the uncertainty as to whether Rust would be able to continue to work for the DOE at its Oak Ridge facility, the total volume of construction work at the Oak Ridge facility decreased substantially in the

three years prior to trial. The volume of work decreased from $98 million in 1987 to $67 million in 1989; in 1990, the company projected a further decrease to $53 million. Rust experienced a corresponding reduction in work force. In 1987, Rust had 1500 craft employees at Oak Ridge. By 1989, this figure was reduced to 725. The salaried workforce also decreased from 221 in 1988 to 155 in 1989. The department in which the plaintiff worked experienced force reductions of 25 percent.

Campbell, who was born in 1932, was first employed as a laborer for Rust in 1977. He then worked elsewhere for a short time but was rehired by Rust in April of 1979. Over the next nine years, the plaintiff worked for Rust in Oak Ridge, Tennessee, as a time-keeper; a key punch operator; and, finally, as an administrative assistant. On July 29, 1988, the plaintiff was laid off. He was 55 years old.

The plaintiff worked in Rust's financial management department, which was made up of six sections. In 1988, Les Johnson headed the entire department. The plaintiff held several clerical positions in the financial management department. From April 1979 to April 1982, he worked as a time keeper in the payroll section. From April 1982 to April 1985, the plaintiff worked as a key-punch operator in the computer section. From 1985 until his layoff in July of 1988, the plaintiff was an administrative assistant in the material control section. In his final position, the plaintiff was supervised by two section managers, Tom McWhorter and Carl Morris, and by a lower level supervisor, Jim Lahman.

As a result of the decrease in the volume of business, the company decided to lay off employees. In July of 1988, department head Les Johnson decided that three administrative assistants in the financial management department would have to be laid off. The candidates for layoff included Gary Harris, age 41; Allen Byrd, age 24; Frank Campbell, age 55; David Joyce, age 31; Dan Miles,

age 23; and Gary Underwood, age 27. The employees ultimately selected for layoff were David Joyce, a summer hire; Gary Harris, who had been employed full-time by the company only since April 1988; and the plaintiff. Harris was recalled for work two months later as a mail-room clerk.

Les Johnson, responsible for making the ultimate decision as to who was to be laid off in the financial management section, chose between Allen Byrd and plaintiff Campbell. Allen Byrd, age 24, was hired in 1984 and transferred into Campbell's department in January 1988. The company maintains that "Johnson concluded that Byrd was superior from both the standpoint of his attitude toward[] work and his versatility."

Morris, one of plaintiff's supervisors, met with the plaintiff and Jim Lahman, another member of the material control section, in late June or early July, and told them that Morris's boss, Les Johnson, had decided to pull plaintiff and Lahman off their regular jobs to do a special bar coding project, a short-term project. The plaintiff left that meeting but returned a few minutes later and spoke to Morris. The plaintiff recounted this conversation as follows:

> And that's when I got to thinking about it and went back to talk to Mr. Morris my hisself [sic]. And that's when Mr. Morris and I had a discussion about whether the change was permanent or whether it was temporary, and he said that he and Les [Les Johnson] had made a decision to go with Alan Byrd, the younger boy, to free me to go with Jim Lahman to do the bar code.
>
> And I asked him if that was going to be true after the bar code was established, and he said as far as he knew or was [sic], that he didn't know what was down the road.

(App. at 41). At another point during the trial, the plaintiff testified that Morris told him at this meeting

that Morris and Johnson had "made a decision to go with Byrd as a younger person on my job." (*Id.*).

Prior to working on the bar code project, the plaintiff was instructed to teach Byrd how to perform the plaintiff's work functions. As a result, the plaintiff concludes that Byrd replaced him. Rust, however, argues that its decision to lay off employees took place after the decision to have Campbell work on the special bar coding project. Campbell was laid off on July 29, 1988, one month after his assignment to the bar coding project.

II. Admissibity of Plaintiff's Conversation with Morris

Defendant sets forth several arguments to support its claim that the plaintiff's restatement of his conversation with his supervisor, Morris, should not have been admitted into evidence. We must affirm the magistrate's evidentiary ruling unless the magistrate abused his discretion. *United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir. 1986).

First, defendant argues that Morris's statement was merely a stray remark and, thus, would not support a jury's inference of age discrimination. The defendant cites *Gagne v. Northwestern National Insurance Co.*, 881 F.2d 309 (6th Cir. 1989), to support its contention. In *Gagne*, a supervisor made an isolated remark during a meeting attended by a number of employees that he "'needed younger blood.'" *Id.* at 314. The court held that the "isolated and ambiguous" nature of the statement made it "'too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.'" *Id.* at 314 (quoting *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 n.2 (6th Cir. 1987)). Unlike *Gagne*, in the current case, Morris, the plaintiff's supervisor, made reference to age in a one-on-one discussion concerning plaintiff's particular reassignment and replacement. Thus, because the circumstances are not analogous to *Gagne*, we cannot hold that the magistrate

abused his discretion in allowing the alleged conversation to be admitted into evidence.

Defendant also argues that because plaintiff inconsistently recounted the conversation with Morris, it would be impossible for the jury "to reliably determine what the statement actually was." On a motion for a JNOV, however, the evidence is considered in the light most favorable to the non-moving party, which in this case is plaintiff Campbell. Variations in Campbell's testimony are considered by the jury when assessing Campbell's credibility. The magistrate, however, in deciding whether to grant a JNOV, could not consider the issue of credibility.

Finally, defendant asserts that because no evidence supported the conclusion that Morris had any authority to make layoff decisions, Morris's "age conscious" statement to plaintiff Campbell should have been excluded. Rust cites *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1968), for support. In *Schrand*, we concluded that certain statements made to non-plaintiffs should have been excluded from evidence because "there was no evidence from which the alleged statements . . . could logically or reasonably be tied to the decision to terminate [the plaintiff]." *Id.* at 156. In contrast, however, Campbell's conversation with Morris directly concerned Campbell's employment status with Rust. Thus, *Schrand* is not controlling. Additionally, Morris was Campbell's direct supervisor and had significant input into the decision as to who should be released.

III. Denial of Defendant's Motion for JNOV

Rust also argues that the magistrate erred in denying Rust's motion for JNOV. Rust asserts that the plaintiff failed to present a prima facie case that he was discharged on the basis of age discrimination and that therefore a JNOV should have been granted.

The question to be addressed in reviewing a district court's denial of a motion for JNOV or for a directed verdict is whether the evidence, when viewed in the light most favorable to the nonmoving party, raises any material questions of fact for the jury. This court must not pass on the credibility of witnesses, weigh the evidence, or substitute its judgment for that of the fact-finder. *Agristor Leasing v. A.O. Smith Harvestore Prods., Inc.*, 869 F.2d 264, 268 (6th Cir. 1989); *Frost v. Hawkins County Bd. of Educ.*, 851 F2d 822, 826 (6th Cir), *cert. denied*, 109 S. Ct. 529 (1988).

This Court has previously addressed the issue of the amount of evidence needed to establish a prima facie case of age discrimination. *See McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073, 1076 (6th Cir. 1989) (citing cases). We have decided not to adopt rigid guidelines for establishing prima facie cases and instead have opted for a case by case approach. We have held, however, "in cases of corporate reorganization[,] a plaintiff must come forward with 'additional direct, circumstantial, or statistical evidence that age was a factor in his termination . . . .'" *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987) (citing *Ridenour v. Lawson Co.*, 791 F.2d 52 (6th Cir. 1986)). Plaintiff's testimony regarding his conversation with Morris and the circumstances surrounding his termination provide such additional support.

The evidence presented to the jury included the statement plaintiff's supervisor made, which referred to selecting his replacement because he was the younger man; Rust's assignment of plaintiff to the bar coding project, a job of limited duration, less than one month before plaintiff was laid off; Rust's request that the plaintiff train Byrd, a 24-year old, to perform plaintiff's permanent job functions; and Rust's subsequent layoffs in plaintiff's department only of men in the protected age group and a temporary employee. Plaintiff's theory of the case, *i.e.*, that Rust decided to lay him off and re-

place him with another, younger man prior to assigning him to the special bar coding project, is not unsupported. A rational jury, viewing the evidence in the light most favorable to the plaintiff, could have found for the plaintiff.

IV. Damages

The defendant disputes the applicability or amount of several of the damage awards. We will consider each disputed element of damages in turn.

Liquidated Damages

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides that "liquidated damages shall be payable only in cases of willful violations." Although the ADEA refers to the Fair Labor Standards Act for defining "liquidated damages," the ADEA does not provide a definition of "willful."

In *Schrand*, we held that a "defendant's conduct [is] willful only if age was the predominant factor in the decision to terminate the plaintiff." 851 F.2d at 158. Viewing the evidence in the light most favorable to Campbell, we cannot conclude that the district court committed reversible error in denying the JNOV motion on the willfulness issue. There was evidence from which the jury could conclude that age was the predominant factor in Rust's decision to terminate Campbell.

Front Pay

The jury awarded the plaintiff $65,370 in front pay. The defendant, however, argues that the court should not have submitted the front pay issue to the jury. In *Fite v. First Tennessee Product Credit Ass'n*, 861 F.2d 884 (6th Cir. 1988), we held that it was not an abuse of discretion for the court to allow the jury to award front pay. *Id.* at 892.

Rust further argues that the trial court somehow felt it had no discretion because *Fite* was the controlling

authority. Since *Fite* makes it clear that whether the issue of front pay goes to the jury is discretionary with the trial judge, we reject Rust's contention that the magistrate thought he had to make front pay a jury issue.

We also find defendant's claim that the jury's award of front pay was excessive to be without merit. Defendant argues that the award was necessarily speculative and, as a result, excessive due to the uncertainties confronting Rust's operation at Oak Ridge and the difficulty in projecting the length of the plaintiff's employment with Rust. We disagree. Although Rust had not yet secured another contract at the DOE's Oak Ridge facility, Rust had had a contract with the DOE since the 1960s. Thus, a jury could have reasonably assumed that Rust would continue to employ people in Oak Ridge. Also, because the plaintiff had worked for the defendant for nine years, it was reasonable for them to conclude that the plaintiff would continue to work for Rust. "[A] jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Green v. Francis*, 705 F.2d 846, 850 (6th Cir. 1983).

Damages for Tennessee State Claim

Tennessee Code Annotated § 4-21-311 provides that anyone injured by a violation of the Tennessee Human Rights Act may bring an action "to recover the actual damages sustained by him or her[.]" This section was amended in 1989 to provide that "[i]n addition to the remedies set forth in this section, all remedies described in § 4-21-306 shall be available in any such lawsuit." Among the remedies provided by Tenn. Code Ann. § 4-21-306 is "[p]ayment to the complainant of damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice[.]" The jury awarded $68,897 for plaintiff's embarrassment and humiliation.

The evidence used to support the jury's award is plaintiff's testimony that the layoff "hurt me quite a bit" and that he was embarrassed whenever he saw Rust employees with whom he had formerly worked.

Under Tennessee law "the review [of damages awards] in the Court of Appeals is subject to the rule that if there is any material evidence to support the award, it should not disturbed." *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125, 129 (1980). Although Tennessee's standard for reducing damages is restrictive, we believe the trial court abused its discretion when it held that the award was "within the limits of a reasonable range." (App. at 49). Plaintiff suffered no aggravated injuries as a result of his layoff. Rather, the injuries he sustained were merely those normally associated with losing a job, *i.e.*, overall disappointment about not being employed. The award of damages for embarrassment and humiliation, in the absence of aggravating circumstances, is excessive, particularly given the generous front pay award by the jury. This issue is remanded to the district court with instructions to order a remittitur reducing the amount of damages under this claim to $10,000. In the event plaintiff refuses to make the remittitur, a new trial is ordered on the issue of damages only under the Tennessee cause of action. At the new trial, the jury is to be made aware of the amounts that plaintiff has already been awarded in this case.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

No. CIV 3-88-924

FRANK CAMPBELL,

Plaintiff,

v.

RUST ENGINEERING COMPANY, INC.,

Defendant.

MEMORANDUM OPINION

[Filed Apr. 5, 1990]

This is an action brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, and the Tennessee Human Rights Act, T.C.A. §§ 4-21-101, *et seq.* The plaintiff also sought recovery in connection with a second pendent claim alleging retaliatory discharge in violation of the public policy of the State of Tennessee. The case was tried before the undersigned and a jury over a four-day period in September, 1989. The jury awarded plaintiff $15,733 in back pay, $65,370 in front pay, and $68,897 for humiliation and embarrassment in connection with the pendent age discrimination claim. The back pay award was doubled because the jury found that defendant had acted willfully. The jury found in favor of the defendant in connection with the pendent retaliatory discharge claim.

The defendant moves for judgment n.o.v., or, in the alternative, for a new trial.

Frank Campbell was employed by Rust Engineering Company ("Rust") on April 16, 1979, and was laid off

on July 29, 1988. Born September 9, 1932, plaintiff was age 55 at the time of his layoff.

Rust is a prime contractor of the United States Department of Energy ("DOE") under which it performs maintenance and construction work at government owned facilities at Oak Ridge. Rust's initial construction contract with DOE was made in 1966. Its initial maintenance contract was made in 1967. Both contracts continued until 1978, at which time they were rebid by DOE. Rust was awarded a contract for both maintenance and construction. This contract will terminate on September 30, 1990. DOE has issued a request for procurement. Rust expects to compete but it has no assurance that it will be the successful bidder.

I.

A motion for judgment notwithstanding the verdict raises a pure question of law. "The issue raised by a j.n.o.v. is whether there was sufficient evidence to raise a question of fact for the jury." *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1375 (1987).

> In determining whether the evidence was sufficient, the court may neither weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. Instead, the evidence must be viewed in the light most favorable to the party against whom the motion was made, drawing from that evidence all reasonable inferences in his favor.

803 F.2d at 265. A mere scintilla of evidence will not support a jury verdict, however. If the court finds that the evidence points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then judgment n.o.v. is appropriate. *Id.*

The plaintiff's contentions as set forth in the pretrial order are as follows. He claims that he was first employed

by the defendant in 1979; that he was terminated at age 55 on July 29, 1988; that his position at termination was Administrative Assistant IV, Grade 6 in the Material Control section; that shortly before he learned that he would be terminated he was told to teach his position to Alan Byrd, age 24; that Mr. Byrd received a promotion to Administrative Assistant IV, Grade 6, and took over the plaintiff's job function; that the plaintiff was told by his supervisor that the defendant wanted a younger man in plaintiff's position; that Mr. Byrd is still employed by defendant; that the defendant worked under a contract with the United States Department of Energy in Oak Ridge, Tennessee; that as part of his job duties the plaintiff was required to participate in and certify inventories of government property; that these inventories were used for documentation of reports submitted to the U.S. Department of Energy; that in 1986 the plaintiff was requested to sign a false and fraudulent inventory report of garage parts; that the plaintiff refused to sign it, but after pressure he agreed to allow it to be sent in because his supervisor promised that a true and correct inventory would be done "within a few months"; that despite plaintiff's repeated requests, this corrected inventory was never done; that after his refusal, the plaintiff was subjected to harassment which included having his office moved from location to location without any advance notice, not being included in meetings, and having his job duties taken away from him; that shortly before his termination, plaintiff again inquired of his supervisor when the inventory of garage parts would be taken because it was supposed to be done annually; that the false inventory was never corrected; that the plaintiff expressed his concern because he was in charge of garage parts; that at this time, defendant was involved in another inventory where a significant amount of sheet metal was unaccounted for and plaintiff's supervisor told him he would handle the discrepancy by writing tickets against it; that the plaintiff replied that it would be "crooked"

for him to do that; that almost immediately thereafter he was terminated; that the defendant's conduct violated the ADEA, the Tennessee Human Rights Act, and plaintiff's right not to be discharged from his job in violation of the public policy of the state of Tennessee.

The defendant's contentions as set forth in the pretrial order are as follows. It claims that the plaintiff was terminated as a result of a reduction in force in July, 1988; that the plaintiff was selected for the reduction in force because he was not as good, productive or versatile an employee as those retained; that the decision to include the plaintiff was in no way based upon the plaintiff's age or any issue related to his participation in the taking of inventory, including questions he allegedly raised about inventory records maintained by the defendant; that the defendant based its decision to lay off the plaintiff on legitimate reasons related to the plaintiff's relative standing as a productive employee compared to others in his group; that, therefore, his termination was neither a violation of the ADEA, the Tennessee Human Rights Act, nor a violation of public policy, and the plaintiff is entitled to no recovery.

The issues submitted to the jury were as follows:

(1) Did the defendant's actions in terminating the plaintiff violate the ADEA and the Tennessee Human Rights Act?

(2) If so, was the violation willful?

(3) Did the defendant's actions in terminating plaintiff violate the public policy of the State of Tennessee and, if so, is the plaintiff entitled to any relief?

(4) If the defendant discriminated against the plaintiff and/or if the defendant violated the public policy in terminating plaintiff, what are his damages?

The jury decided issues nos. 1, 2, and 4 in plaintiff's favor and decided no. 3 in defendant's favor.

"The ultimate issue in this age discrimination suit is whether age was a determining factor in the employer's decision to fire the plaintiff." *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983). The question that must be addressed at this point in regard to the motion for judgment n.o.v. is whether or not reasonable minds could differ as to whether age was a determining factor in defendant's decision to terminate the plaintiff. *See Brownlow v. Edgecombe Metals Co.*, 867 F.2d 960, 963 (6th Cir. 1989). Whether or not age was a determining factor in the defendant's decision to terminate the plaintiff "is quintessentially a question of fact," but there must be evidence from which a reasonable jury could conclude that age was the more likely reason for the termination of plaintiff as opposed to a speculative possibility. *Id.; Simpson v. Midland-Ross Corporation*, 823 F.2d 937, 944 (6th Cir. 1987).

The parties have ably detailed the evidence in their post-trial briefs and I see no need to recount all of it here. The most hotly contested item of evidence was an alleged conversation between the plaintiff and Carl Morris which occurred in late June or early July, 1988.[1] Morris was plaintiff's direct supervisor and he was the head of the Material Control section at Rust.

Morris met with the plaintiff and Jim Lahman, another member of the Material Control section, and told them that Morris' boss, L.F. ("Les") Johnson had decided to pull plaintiff and Lahman off their regular jobs to do a special bar coding project. The plaintiff left that meeting but returned a few minutes later and spoke to Morris. The plaintiff testified that the following discussion occurred when he met with Morris the second time that morning:

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[1] My recitation of the evidence will, of course, set it forth in a light most favorable to the plaintiff due to the present posture of the case.

> And that's when I got to thinking about it and went back to talk to Mr. Morris by hisself [sic]. And that's when Mr. Morris and I had a discussion about whether the change was permanent or whether it was temporary, and he said that he and Les had made a decision to go with Alan Byrd, the younger boy, to free me to go with Jim Lahman to do the bar code.
>
> And I asked him if that was going to be true after the bar code was established, and he said as far as he knew or was, that he didn't know what was down the road.

[1/99].[2] At another point during the trial, the plaintiff testified that Morris told him at this meeting that Morris and Johnson had "made a decision to go with Byrd as a younger person on my job . . . ." [1/97-98].

This is not the type of isolated and ambiguous statement that is too abstract or irrelevant to submit to the jury. This was a remark made by plaintiff's supervisor which was made directly to the plaintiff concerning his permanent employment status with the defendant. It was an explanation of why he was losing his job to a 24-year-old employee with less seniority than the plaintiff's. It is not ambiguous in import in that plaintiff's supervisors had decided to go with "Byrd as a younger person" on plaintiff's job permanently. The bar coding job was a task of finite duration but he was told that Byrd was taking his job on a permanent basis. There is evidence from which the jury could have found that when Morris made this statement to the plaintiff, Morris and Johnson had already decided that if it came time to lay off someone, that someone would be the plaintiff. Furthermore, Morris had reason to believe such a layoff would occur [2/196-197]. There is no dispute that the plaintiff was in fact laid off on July 29, 1988.

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[2] The reference is to volume of transcript and page.

The plaintiff takes the position that Les Johnson was the sole decision-maker in connection with the laying off of the plaintiff and that the statement of Morris is therefore irrelevant to defendant's motives in laying plaintiff off. A reasonable jury could have concluded otherwise, however. The following interrogatory and answer were read to the jury:

> Q. State fully each and every reason for the defendant's decision to lay off, terminate plaintiff or otherwise ask plaintiff to submit letter of resignation, and state the name, date of birth and address of all persons participating substantively in the decision-making process.
>
> A. First, plaintiff's layoff was occasioned by the need of the defendant to reduce its forces resulting from the decline in the work at its Oak Ridge operation. Second, the plaintiff was selected because he was not as good, productive or versatile an employee as those retained. The following participated in the decision to select plaintiff for layoff: Lester Johnson, date of birth, 1-17-46; Carl Morris, date of birth, 1-15-31; Jimmy Lahman, date of birth, 5-17-45.

The jury could have taken this as an admission that Morris participated substantively in the decision-making process. Johnson really did not know the plaintiff very well and admitted during his testimony that he probably would have kept the plaintiff if Morris had said to him, "I want to keep Frank Campbell." [2/91-92]. Johnson never met with the plaintiff on a one-on-one basis [2/39]. When the time came to lay the plaintiff off, it was Morris who informed the plaintiff [2/202]. Moreover, plaintiff testified that Morris told him that Morris "*and Les*" had decided to go with Byrd. "Les" is L. F. Johnson.

For these reasons, Morris' statement to plaintiff that Morris and Johnson had decided to go with "Byrd as a

younger person" to do the plaintiff's job on a permanent basis could have been viewed by a reasonable jury as relevant and probative evidence that Byrd was being shifted into plaintiff's job on account of Byrd being a younger person and that this was connected to a plan by Morris and Johnson to terminate the plaintiff in the near future.

Plaintiff was not told that he was being laid off because he was too old; but viewing the evidence in a light most favorable to him, he was told that he was to teach Alan Byrd his job because his supervisors wanted to go with "Byrd as the younger person" in plaintiff's job on a permanent basis. The jury could reasonably infer that it was no coincidence that plaintiff was laid off less than a month after the conversation took place and that Alan Byrd is still doing the plaintiff's job. The statement is evidence from which the jury could reasonably infer that Morris and Johnson wanted Byrd to take over plaintiff's job because Byrd was a younger man. The jury could reasonably infer that shifting Byrd into plaintiff's job was part and parcel of an overall plan to get rid of plaintiff and that age was a determining factor in that plan.

The defendant states in its brief in support of the instant motion that the question of whether Johnson's belief that Byrd was the superior employee had a basis in fact comes down to whether or not the jury believed the explanation that Byrd had exceptional qualities and versatility as opposed to plaintiff's "less-than-desirable attitude." Defendant's Brief at 26. Since plaintiff had to teach Byrd the job *after* plaintiff had lost it permanently, and since the defendant really did not know how well Byrd could do that job at that time, the jury may have questioned whether or not the reasons given were pretextual.

In the present case, the plaintiff proved that he was the oldest of the Administrative Assistants in the Material Control section; that he had the greatest seniority;

that he was terminated; that he was qualified for the position from which he was moved before he was terminated less than a month later; that he was replaced by a younger person with less experience; that his direct supervisor had him teach his job to a 24-year-old man less than a month before his termination; and that the reason plaintiff was told to do so was because plaintiff's supervisors had made a decision to "go with Byrd as a younger person" on the plaintiff's job.

The defendant contends that this is a case where it was facing an economic downturn and that the plaintiff bears a greater burden in proving age discrimination in such a case. ". . . [I]n cases of corporate reorganization a plaintiff must come forward with 'additional direct, circumstantial, or statistical evidence that age was a factor in his termination . . . .'" *Simpson v. Midland-Ross Corp.*, 823 F.2d at 941, quoting *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090-91 (6th Cir. 1984). In my opinion, even if it is assumed that this stricter standard applies here (and plaintiff disputes that it does), the plaintiff created a jury qupestion as to age discrimination with additional direct, circumstantial or statistical evidence and satisfied this stricter standard.

For the foregoing reasons, and for the reasons stated orally from the bench during the trial, the statement was properly admitted and the jury was entitled to consider it as direct evidence of age bias against the plaintiff [1/91-93 (oral ruling on the admission of Morris' statement)]. That evidence, combined with the other evidence of record, was sufficient to create a jury question regarding whether or not age was a determining factor in the decision to terminate the plaintiff. The evidence presented a sufficient disagreement to require that it be submitted to the jury and I do not find that the defendant was entitled to prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S.Ct. 2505, 2512 (1986).

II.

Tennessee law as it existed when the plaintiff's claim arose and when this suit was filed authorized damages for humiliation and embarrassment under the Tennessee Human Rights Act. The Honorable Leon Jordan, United States District Judge, recently dealt with this precise issue in an unpublished opinion in *Cripps v. United Biscuit of Great Britain dba Keebler Co.*, Civ. 3-89-001 (E.D. Tenn., Memorandum Opinion filed October 31, 1989) (copy attached to plaintiff's brief opposing the instant motion). Judge Jordan stated in part as follows:

> Recently, this Court adhered to this construction of the Tennessee Human Rights Act in *Olivia Hannah v. Pitney Bowes, Inc.*, no. 3-88-902 (E.D. Tenn., April 21, Jordan, J.). Observing that although the underlying policies of the Human Rights Act are those embodied in comparable federal civil rights laws, "the Tennessee Human Rights Act is not a mirror image of the federal statute." *Id.*, at p. 4. Given the recent amendment to T.C.A. § 4-21-311 and the decision of the Tennessee Supreme Court in *Plasti-Line, Inc.* [*v. Tennessee Human Rights Comm.*, 746 S.W.2d 691 (Tenn. 1988)], as well as that of the Tennessee Court of Appeals in *Taff* [*v. Media General Broadcast Services, Inc.*, (Shelby Equity no. 32, slip op., Tenn. App., November 3, 1986], this Court finds that it is bound by these authorities. That federal cases do not control the disposition of this issue is axiomatic. *E.g., Bagwell v. Canal Insurance Company*, 663 F.2d 710, 712 (6th Cir. 1981).
>
> Consequently, with all due respect for those federal courts that have reached a contrary conclusion, this Court is duty-bound to follow what is now the clearly expressed law of Tennessee that actual damages include compensatory damages as provided by T.C.A. §§ 4-21-306 and 4-21-311.[3] Moreover, other federal courts have reached an identical conclusion

on the same scope of damages issue. *E.g., Ridenour v. Montgomery Ward and Company*, 786 F.2d 867, 869 (8th Cir. 1986) (construing similar language in the Iowa Civil Rights Act).

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[3] In *Hannah v. Pitney Bowes, Inc., supra*, this Court previously rejected the same limited construction of the actual damages language as proposed by the defendant in the case *sub judice*, refusing to follow the conclusion of another federal district court in *Belcher v. Sears, Roebuck and Company*, 686 F.Supp. 671 (M.D. Tenn. 1988), because that Court had not considered these recent developments.

Slip. op. at 9-10. I adopt this reasoning.

In *Mitchell v. Seaboard System R.R.*, 883 F.2d 451 (6th Cir. 1989), the Court affirmed an award of $7,500 for humiliation and embarrassment based on a pendent claim in a Title VII action. The civil rights action was based upon race discrimination. The district court found that Title VII had been violated and exercised pendent jurisdiction pursuant to KY. Rev. Stat. Ann. § 344.450 (Baldwin 1988) which permitted recovery for humiliation and embarrassment under a Kentucky human rights statute.

The plaintiff described his humiliation and embarrassment at losing his job during his testimony [1/112-113]. By the time he was terminated on July 29, 1988, he was 55 years old with 9½ years of service at Rust. There was evidence from which the jury could infer that he had lost his job to Byrd because management had decided to go with Byrd as a younger person." He even had to teach Byrd his job. He has suffered rejections and disappointments in attempting to find other suitable work [1/109-110]. He described the uncertain and troublesome status of his present employment situation including a lack of benefits like sick leave, vacation pay, health and life insurance, and retirement [1/110].

The award of $68,897 for humiliation and embarrassment was within the limits of a reasonable range and it should stand.

III.

In my opinion, the award for humiliation and embarrassment must be reduced by $15,733 (the amount of liquidated damages) in order to prevent a double recovery by the plaintiff.

> Liquidated damages under the ADEA are permitted to enable plaintiffs who have been the victims of willful discrimination to recover damages for non-pecuniary losses that are difficult to prove. Report of Congressional Conference Committee, [1978] U.S. Code Cong. & Admin. News 528, 535. At least seven courts of appeal, including our own, have held that ADEA liquidated damages are in lieu of damages for loss of reputation, humiliation, mental anguish and other such losses. *Hill v. Spiegel*, 708 F.2d at 235 ad cases cited therein.
>
> Accordingly, we find that to prevent double recovery for such damages, the awards for compensatory damages on the state claims must be reduced by the amount of the liquidated damages awarded under the ADEA.

Merkel v. Scoville, Inc., 570 F. Supp. 141, 150 (S.D. Ohio, 1983), *affirmed in part, reversed in part (on other grounds) and remanded for dismissal*, 787 F.2d 174 (6th Cir. 1986); *see also Garry v. TRW, Inc.*, 603 F. Supp. 157 (N.D. Ohio, 1985).

I will treat the defendant's motion as one to alter or amend judgment on this point and will reduce the $68,897 award for humiliation and embarrassment by $15,733. *See* Rule 59(e), Fed. R. Civ. P.

IV.

Front pay was an appropriate element of plaintiff's damages in this case and it was proper to submit the

question of the amount to the jury. *Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884, 891-894 (6th Cir. 1988). The amount awarded is not beyond the maximum limits of a reasonable range and it will stand.

V.

The defendant's alternative motion for a new trial will be denied. I have considered the grounds asserted in support thereof and conclude that a new trial is not warranted.

Order accordingly,

FILE:

/s/ Robert P. Murrian
ROBERT P. MURRIAN
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. CIV. 3-88-924

FRANK CAMPBELL,
Plaintiff,

v.

RUST ENGINFERING COMPANY, INC.,
Defendant.

ORDER

[Filed Apr. 5, 1990]

For the reasons stated in a Memorandum Opinion this day passed to the Clerk, it is ORDERED that defendant's motion for judgment n.o.v. or for a new trial be DENIED.

Further, it is ORDERED that the motion to alter or amend judgment be GRANTED to the extent that the daamge award of $68,897 for humiliation and embarrassment is reduced to $53,164.00. In all other respects the judgment shall remain as originally entered.

ENTER:

/s/ Robert P. Murrian
ROBERT P. MURRIAN
United States Magistrate

Table 1: Charges Filed [1]

Year [2]	Total EEOC Charges Filed [3]	Total ADEA Charges Filed [4]
1985	119,695	16,784
1986	119,467	17,443
1987	115,536	15,121
1988	117,936	14,882
1989	108,406	14,789
1990	112,628	14,526

[1] Charges filed represents the number of new cases taken by the EEOC during the calendar year.

[2] Calendar year.

[3] Includes charges filed under the Equal Employment Opportunity Act, the Federal Employment Protection Act, and the Age Discrimination in Employment Act of 1967, and other charges.

[4] Charges filed under the Age Discrimination in Employment Act.

(2)

No. 90-1835

Supreme Court, U.S.
FILED
JUN 20 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RUST ENGINEERING COMPANY,
Petitioner,
v.

FRANK CAMPBELL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In ADEA, 29 U.S.C. §§ 629, *et seq*, cases where a jury has been demanded, once the Court decides that reinstatement is not appropriate or feasible, and after the Court decides that front pay is an appropriate consideration, should this Court establish a hard and fast rule that the amount of front pay, if any, should be decided by the Court or by the jury?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. _____

RUST ENGINEERING COMPANY,
Petitioner,
v.

FRANK CAMPBELL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Frank Campbell, the Respondent, respectfully prays that the Petition for Writ of Certiorari, to review the Order of the United States Court of Appeals for the Sixth Circuit that was entered on March 1, 1991, be denied.

STATEMENT OF THE CASE

Respondent, Frank Campbell, Plaintiff below, initially brought this action under the ADEA, 29 U.S.C. §§ 629 *et seq.*, alleging that Rust Engineering Company, Inc., his former employer, Defendant below, had discriminated against him on account of his age when he was replaced with a twenty-four year old and laid off at age fifty-five. Respondent demanded and received a jury trial.[1] Respondent was in the Financial Management department of the Petitioner at the time of his layoff. He sought back pay, benefits, liquidated damages, and reinstatement, or in the alternative, front pay.

In this case, the Petitioner raised six grounds on appeal in the Court of Appeals and now would have this Court review one of the claims.[2] The Magistrate specifically rejected

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[1] The right to a trial by jury in an ADEA action is now established by statute. See 29 U.S.C. § 626(c)(2). See also *Lorillard v. Pons*, 434 U.S. 575 (1978): "We are therefore persuaded that Congress intended that in a private action under the ADEA a trial by jury would be available where sought by one of the parties." *Id.*, p. 585.

[2] In the Sixth Circuit, Petitioner raised the following grounds on appeal: (1) the magistrate erred when he denied defendant's motion for a judgment notwithstanding the verdict (JNOV) with regard to both of plaintiff's claims; (2) the magistrate erred in denying defendant's motion for JNOV with regard to plaintiff's claim for liquidated damages under the ADEA; (3) the magistrate erred when he submitted the question of front pay to the jury, rather than retaining it as a question for the court; (4) the magistrate erred when he denied defendant's motion for a new trial on the basis that the award of front pay was excessive or, in the alternative, erred in not ordering a remittitur reducing this damage award; (5) the magistrate erred when he admitted into evidence a statement by the plaintiff's supervisor; and (6) the magistrate erred when he denied defendant's motion (continued...)

reinstatement as being appropriate prior to allowing the jury to consider what, if any, front pay would be awarded.[3] It should be noted and emphasized that the Petitioner has not questioned the adequacy of the Court's jury instructions on the issue of front pay.

In this case, an economist testified for Respondent on the issue of damages, and, of course, reduced the amount to present value. The Petitioner did not use an expert. The Magistrate denied Petitioner's Motion for Remittitur on the issue of front pay finding that the amount of front pay awarded was within the range of reasonableness.

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[2](...continued)
for a JNOV on plaintiff's claim under Tennessee law and also when he refused to grant defendant's motion for a new trial on this issue.

[3] The Magistrate, in holding that reinstatement was not appropriate, made the following finding:

> "... the Plaintiff's prospects for re-employment with Rust appear to be somewhat dim because he was dismissed based on their assertion that he has an attitude problem. He has less than a high school diploma. He is now fifty-seven years old. He has searched for a job. He has found one, but there are no fringe benefits with that job and no promise of a continuity of employment." (Magistrate Murrian, transcript of the record 3/66-67)

ARGUMENT

The Respondent respectfully submits that this petition should be denied in that there are no special or important reasons for the granting of the writ. The Petitioner asserts that this Honorable Court should grant the Writ in order to establish a hard and fast rule that the trial Court, and not the jury, should quantify the amount of front pay awarded, if any, after the Court determines that reinstatement is not appropriate or feasible, and after the Court determines front pay is an appropriate remedy in fashioning relief. The Respondent would respectfully submit that there is no special or important reason to grant the Writ, since the Petitioner acknowledges in its brief that there is no conflict between the Circuits on the availability of front pay as a remedy and there is no conflict between the Circuits on the issue of who decides if reinstatement or front pay, if any, is appropriate.

The Petitioner asserts that there is a major conflict among the Circuits with regard to the question of whether the "quantification" of front pay is for the court to decide or for the jury to decide. The Respondent would respectfully submit that the alleged "conflict" on who decides the amount, if any, is without significance, because the Circuits have all held, either expressly or by strong implication, that the issue of reinstatement versus front pay is a matter within the sound discretion of the trial court in fashioning relief.[4] See, *Wildman*

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[4] For example, the Sixth Circuit, in *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984), cited the applicable statute and concluded as follows:

(continued...)

v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258 (2d Cir. 1987); *Maxfield v. Sinclair International*, 766 F.2d 788, 795-797 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Duke v. Uniroyal, Incorporated*, 928 F.2d 1413, 1429 (4th Cir. 1991); *DeLoach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990); *Hansard v. Pepsi-Cola Metropolitan Bottling Company, Inc.* 856 F.2d 1461, 1469 (5th Cir.), *cert. denied* --- U.S. ---, 110 Supreme Court 129 (1989); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 932 (6th Cir. 1984); *Fite v. First Tennessee Protection Credit Ass'n*, 861 F.2d 884, 892 (6th Cir. 1988); *Schrand v. Federal Pacific Electrical Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1332 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988), *vacated on other grounds*, 486 U.S. 1020 (1988), *on remand*, 860 F.2d 834 (7th Cir. 1988); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989); *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990); *Gibson v.*

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[4](...continued)

"'In any action brought to enforce this chapter the court shall have jurisdiction to grant *such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter*, including *without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.' 29 U.S.C. § 626(b) (emphasis added [in original]).

"In addition, subsection (c) provides in part,

"'Any person aggrieved may bring a civil action in any court of competent jurisdiction for *such legal or equitable relief as will effectuate the purposes of this chapter.*' 29 U.S.C. § 626(c)(1) (emphasis added [in original]). In light of this language, we hold that front pay is a remedy available to the trial court for use, in its discretion, in fashioning relief."

Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); *EEOC v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166, 1171-1173 (10th Cir.), *cert. denied*, 474 U.S. 954 (1985); *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988); and *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988).[5] Since the remedy is discretionary, the Respondent would respectfully submit that the "hard and fast" rule sought by the Petitioner is not necessary.

The Petitioner argues that there are three different views emerging from the various Circuits on the issue of who quantifies an award of front pay, but Petitioner admits there is consensus on the important issue of the availability of front pay as a remedy and on the important issue of who decides if front pay is an appropriate remedy. The Petitioner asserts that the decisions of the First, Second, Fourth, Fifth, Eight and Eleventh Circuits hold that front pay is an "equitable remedy", and that the amount of front pay to be awarded is a question for the Court. Petitioner argues that the Seventh and Tenth Circuits apparently agree with the rationale of these decisions. Petitioner asserts that the opposite view is represented by the decisions of the Third and Ninth Circuits, which, Petitioner states, expressly hold that front pay is a legal remedy, and that the amount of front pay to be awarded is a question for the jury. The Petitioner argues that the Sixth Circuit holds that whether front pay is quantified by the Court or the jury is a question that lies within the discretion of the trial judge. Examination of the opinions reveals that there is clear consensus between the Circuits that the issue of reinstatement versus front pay is for the Court to decide. See *Fite v. First*

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[5] See generally, *Age Discrimination in Employment*, 74 ALR Fed 745.

Tennessee Protection Credit Ass'n, 861 F.2d 884 (6th Cir. 1988). The Respondent would submit that reinstatement and front pay should not be subject to a per se rule, but will depend on the facts and circumstances of the individual case.[6] The respondent would respectfully submit that the "conflict" on whether the Court or jury quantifies the amount, if any, is not significant because there is agreement throughout the Circuits on the availability of front pay and there is agreement throughout the Circuits that the trial court must first make a determination on the feasibility or practicality of reinstatement. There is also agreement throughout the Circuits that reinstatement versus front pay, if any, is discretionary with the Court. There is no issue in this case that the Trial Court's jury instructions on front pay were erroneous, and as to the factual question of the amount of front pay, if any, even if a jury quantifies it initially, the trial judge still retains power to review the amount as it did and as the Court of Appeals did in the case at hand.

The Petitioner also argues that besides the alleged "conflict" in the Circuits, that the second reason for granting the petition involves Court's Rule 10.1(c). The Petitioner asserts that whether the court or the jury decides the amount of front pay to award is a question of "fundamental importance" in the administration of the ADEA. However, Petitioner cites no evil

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[6] In *Davis v. Combustion Engineering*, 742 F.2d 916, 923 (6th Cir. 1984), the Court concluded:

> "We join the Eighth Circuit in concluding that the purpose of the Act is to make people whole and that which makes people whole is a matter for the discretion of the trial court under the facts and circumstances of the individual case. See, *Gibson, supra*, at 1097, 1101." [*Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982).]

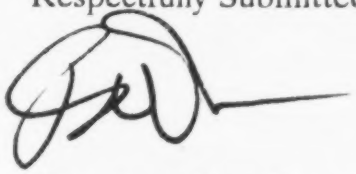
from the practice of allowing a jury to decide the amount, because the Court will first decide if front pay is an appropriate remedy, the Court will instruct the jury on the law to apply, and the Court will maintain supervisory power over the amount of the award.

WHEREFORE, the Respondent would respectfully pray for the Writ of Certiorari to be denied.

CONCLUSION

For the reasons set forth in this brief, the Respondent would respectfully pray for the petition to be denied.

Respectfully Submitted,



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